IN THE SUPREME COURT
OF FLORIDA

Case No. 94,846

MAZZONI FARMS, INC., a Florida corporation,

Appellant,

v.

E.I. DuPONT DE NEMOURS AND COMPANY, a Delaware corporation, d/b/a DuPONT, and CRAWFORD & COMPANY, a Georgia corporation,

Appellees.

JACK MARTIN GREENHOUSES, INC., and PLANTAS LA PALOMA, INC., a dissolved Puerto Rico corporation through its Trustee Jack Martin,

Appellant,

v.

E.I. DuPONT DE NEMOURS AND COMPANY, a Delaware corporation, d/b/a DuPONT, and CRAWFORD & COMPANY, a Georgia corporation,

Appellees.

ON APPEAL FROM UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INITIAL BRIEF OF APPELLANTS

FERRARO & ASSOCIATES, P.A.
Suite 3800
200 South Biscayne Boulevard
Miami, Florida 33131
-and-
RUSSO, WELLS & ASSOCIATES, P.A.

Appellate Law Center
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660

Attorneys for Appellants

CERTIFICATE OF TYPE SIZE AND STYLE

Appellants Mazzoni Farms and Jack Martin Greenhouses are utilizing a twelve (12) point Courier font in this brief.

TABLE OF CONTENTS

Page

CERTIFICATE OF TYPE SIZE AND STYLE i

TABLE OF CITATIONS iv

STATEMENT OF THE CASE AND FACTS 1

A. Introduction 1

B. Statement of the case and facts 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

CERTIFIED QUESTION I

DOES A CHOICE-OF-LAW PROVISION IN A SETTLEMENT AGREEMENT CONTROL THE DISPOSITION OF A CLAIM THAT THE AGREEMENT WAS FRAUDULENTLY PROCURED, EVEN IF THERE IS NO ALLEGATION THAT THE CHOICE-OF-LAW PROVISION ITSELF WAS FRAUDULENTLY PROCURED? 6

CERTIFIED QUESTION II

IF FLORIDA LAW APPLIES, DOES THE RELEASE IN THESE SETTLEMENT AGREEMENTS BAR PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIMS? 10

CONCLUSION 16

CERTIFICATE OF SERVICE 17

TABLE OF CITATIONS

Page

Bilotti v. Accurate Forming Corp., 118 A.2d 24 (N.J. 1963) 15

Biscoe v. Evans, 181 So. 2d 564 (Fla. 1st DCA 1966) 13

Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980) 6

Braemer Isle Condominium Assoc., Inc. v. Boca Hi, Inc., 632 So. 2d 707 (Fla. 4th DCA 1994) 13

Buchanan v. Clinton, 293 So. 2d 120 (Fla. 1st DCA 1974) 12, 13, 15

Cerniglia v. C. & D. Farms, Inc., 203 So. 2d 1 (Fla. 1967) 7

Defigueiredo v. Publix Super Markets, Inc., 648 So. 2d 1256 (Fla. 4th DCA 1995) 12-14

DiSabatino v. United States Fidelity & Guaranty Co., 635 F. Supp. 350 (D.Del. 1986) 15

Estate of Gimbert, et al. v. Lamb, 601 So. 2d 230 (Fla. 2d DCA 1992) 12, 15

Florida East Coast Railway Co. v. Thompson, 111 So. 525 (Fla. 1927) 12-14

Florida Power & Light Co. v. Horn, 131 So. 219 (Fla. 1930) 13

Ford v. Coleman, 462 So. 2d 834 (Fla. 5th DCA 1984), rev. denied, 475 So. 2d 694 (Fla. 1985) 14

Gillen v. United Services Automobile Ass'n, 300 So.2d 3 (Fla. 1974) 7

Goyings v. The Jack and Ruth Eckerd Foundation,
403 So. 2d 1144 (Fla. 2d DCA 1981) 7, 11

Greene v. Kolpac Builders, Inc.,
549 So. 2d 1150 (Fla. 3d DCA 1989) 14

HTP, Ltd. v. Lineas Aereas Costarricenses,
685 So. 2d 1238 (Fla. 1996) 11, 12, 15

Iowa National Mutual Insurance Co. v. Worthy,
447 So. 2d 998 (Fla. 5th DCA 1984) 15

Jacksonville Terminal Co. v. Misak,
102 So. 2d 295 (Fla. 1958) 13

Kellums v. Freight Sales Centers, Inc.,
467 So. 2d 816 (Fla. 5th DCA 1985) 7, 11

Levine v. Levine,
648 So. 2d 1228 (Fla. 4th DCA 1995) 14

Lloyd v. Cooper Corporation,
134 So. 562 (Fla. 1931) 7

Location 100, Inc. v. Gould S.E.L. Computer
Systems, Inc.,
517 So. 2d 700 (Fla. 4th DCA 1987) 6

Mankap Enterprises, Inc. v. Wells Fargo
Alarm Services,
427 So. 2d 332 (Fla. 3d DCA 1983) 7, 11

Matsuura v. E.I. DuPont de Nemours & Co.,
___ F.3d ___, 1999 WL 42166
(9th Cir. 1999) 8

Mazzoni Farms, Inc., et al. v. E. I. DuPont de
Nemours and Co., et al.,
12 Fla. L. Weekly Fed. C491 (11th Cir. Feb. 4, 1999) 1

McGill v. Henderson,
98 So. 2d 791 (Fla. 1957) 14

Mettler, Inc. v. Ellen Tracy, Inc., 648 So. 2d 253 (Fla. 2d DCA 1994) 14

Oceanic Villas, Inc. v. Godson, 4 So. 2d 689 (Fla. 1941) 7, 11

Pan-American Life Insurance Co. v. Fuentes, 258 So. 2d 8 (Fla. 4th DCA 1971) 13

Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301 (2d Cir. 1979), cert. denied, 449 U.S. 981 (1980) 15

Sturiano v. Brooks, 523 So. 2d 1126 (Fla. 1988) 6

T.D. McCurley v. Auto-Owners Insurance Co., 356 So. 2d 68 (Fla. 1st DCA 1978) 14

Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc., 377 So. 2d 825 (Fla. 1st DCA 1979) 7

Winter Park Telephone Co. v. Strong, 179 So. 289 (Fla. 1938) 12-14

Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995) 11, 12

Zuckerman v. Vernon Corporation v. Rosen, 361 So. 2d 804 (Fla. 4th DCA 1978) 7, 11

Other authorities cited

Fla.R.App.P. 9.150 1

Restatement of the Law Second, Conflict of Laws §201 9

§25.031, Fla. Stat. 1

STATEMENT OF THE CASE AND FACTS

A. Introduction

Plaintiffs/Appellants Jack Martin Greenhouses, Inc. and Mazzoni Farms, Inc. hereby respectfully submit their statement of the case and facts in these consolidated appeals which appear before this Court on questions certified by the United States Eleventh Circuit Court of Appeals pursuant to §25.031, Fla. Stat. and Fla.R.App.P. 9.150. (A. 1-10).[1]

The appeals were taken from final orders of the U.S. District Court for the Southern District of Florida which dismissed with prejudice suits brought by the Plaintiffs/Appellants against Defendants/Appellees E.I. DuPont de Nemours and Company and Crawford & Company for fraud in the inducement of certain settlement agreements. (A. 1-10). The questions which have been certified to this Court by the Eleventh Circuit are:

> Does a choice-of-law provision in a settlement agreement control the disposition of a claim that the agreement was fraudulently procured, even if there is no allegation that the choice-of-law provision itself was fraudulently procured?

---

[1]A copy of the Eleventh Circuit's opinion is attached hereto as an appendix and will be referenced as (A. ___). The decision also appears at Mazzoni Farms, Inc., et al. v. E.I. DuPont de Nemours and Co., et al., 12 Fla. L. Weekly Fed. C491 (11th Cir., Feb. 4, 1999).

> If Florida law applies, does the release in these settlement agreements bar plaintiffs' fraudulent inducement claims?

(A. 9-10).

B. Statement of the case and facts

Plaintiffs/Appellants Jack Martin Greenhouses and Mazzoni Farms (hereinafter "Plaintiffs" or "the plant nurseries") are Florida plant nurseries — growers of ornamental trees and shrubs. (MF R1-1-8-9; JMG R1-1-10).[2] Plaintiffs sued DuPont and its agent Crawford & Company in these lawsuits for defrauding them into settling products liability lawsuits they had brought against DuPont for mass destruction of trees and plants in their nurseries caused by DuPont's defective produce Benlate. (MF R1-08-20; JMG R2-33-1-9).

The Plaintiff nurseries alleged in their complaints that during discovery in the nurseries' prior lawsuits against DuPont,

---

[2]The Plaintiff nurseries' lawsuits were filed separately in state court, and, when removed to the U.S. District Court for the Southern District of Florida, were assigned separate case numbers. Although the cases were transferred to the same district judge — The Honorable Joan A. Lenard — each retained its own case number and each has its own separate record on appeal. Since these appeals were certified to this Court from the Eleventh Circuit and at the suggestion of the Clerk, Plaintiffs' record references are made in accordance with 11th CIR. R. 28-2(i), but with the initial designations of MF (for Mazzoni Farms) and JMG (for Jack Martin Greenhouses) added to distinguish between the two separate records.

DuPont had lied and actively concealed evidence adverse to DuPont for the purpose of minimizing the value of the nurseries' claims. (MF R1-1-9; JMG R1-1-10). Plaintiffs alleged that they reasonably relied on DuPont's discovery responses believing them to be in compliance with DuPont's affirmative duty to speak the truth in fulfilling court discovery obligations. Plaintiffs further alleged that as a result of their reliance on the false information conveyed by DuPont in discovery, they settled the claims for the loss of their plants and trees for a fraction of their true settlement value given the actual evidence that DuPont had concealed and lied about.

Plaintiffs alleged that as part of the fraudulently induced settlements, Plaintiffs signed settlement agreements and releases prepared by DuPont. (MF R1-8-1-11; JMG R2-33-1-9) Contained in the documents was a choice-of-law provision stating that Delaware law would govern the release. (MF R1-8-13-21; JMG R2-33-12-18).

The Plaintiffs initially filed their suits against DuPont in Florida state court, and DuPont removed them to the U.S. District Court for the Southern District of Florida. (MF R1-1-9; JMG R1-1-9). DuPont moved to dismiss the suits on grounds that they were barred by the releases DuPont had obtained from the nurseries

in the settlements of the prior lawsuits. (MF R1-9-1-3; JMG R1-6-1-3). The U.S. district judge granted DuPont's motions to dismiss, and entered final orders of dismissal of the Plaintiffs' actions. (MF R2-47-1-7; JMG R2-43-1-7).

The Plaintiff nurseries then timely initiated their appeals to the U.S. Eleventh Circuit Court of Appeals (MF R2-48; JMG R2-44), and the Eleventh Circuit issued its opinion on February 4, 1999, certifying the above-cited questions to this Court. In the opinion, the Eleventh Circuit indicated concern about what law should apply to resolution of the merits of the appeal. (A. 1-10). Concluding that there is "no definitive Florida precedent for the choice-of-law issue" (A. 3), the Eleventh Circuit certified the choice-of-law question to this Court. (A. 1-10). The Eleventh Circuit also recognized, however, that the Plaintiffs' argument on the merits, to wit, that under Florida law <u>no</u> provisions of a settlement procured by fraud should enforced, would also effectively answer the choice-of-law question. The Eleventh Circuit therefore also certified to this Court the question on the merits of whether under Florida law a release procured by fraud bars a claim for its fraudulent procurement. (A. 8-10).

SUMMARY OF ARGUMENT

The first question certified to this Court by the Eleventh Circuit is: "Does a choice-of-law provision in a settlement agreement control the disposition of a claim that the agreement was fraudulently procured, even if there is no allegation that the choice-of-law provision itself was fraudulently procured?" Plaintiffs/Appellants submit that this question is not presented in this case because Plaintiffs have alleged that the entire agreement was procured through fraud so that none of its provisions should be enforced, and because the choice-of-law provision was itself procured through fraud.

If this first question is deemed to have been raised by the facts in these cases, it should be answered in the negative. Under Florida's choice-of-law rules, foreign law will not be applied in Florida if it works a result that contravenes Florida public policy. Florida public policy does not allow parties to contract against liability for their own frauds and other intentional torts.

The second question certified to this Court by the Eleventh Circuit is: "If Florida law applies, does the release in these settlement agreements bar Plaintiffs' fraudulent inducement claims?" That question should be answered in the negative.

Florida law quite clearly permits defrauded parties to sue for damages caused by fraud in the inducement of a settlement without holding that the very release that was fraudulently procured from them acts as a bar to the courthouse doors.

ARGUMENT

CERTIFIED QUESTION I

DOES A CHOICE-OF-LAW PROVISION IN A SETTLEMENT AGREEMENT CONTROL THE DISPOSITION OF A CLAIM THAT THE AGREEMENT WAS FRAUDULENTLY PROCURED, EVEN IF THERE IS NO ALLEGATION THAT THE CHOICE-OF-LAW PROVISION ITSELF WAS FRAUDULENTLY PROCURED?

The Eleventh Circuit certified the choice-of-law question to this Court because Florida has not specifically determined the issue of whether a choice-of-law provision in a contract or settlement procured through fraud will be given effect. As set forth below, we submit that established Florida choice-of-law principles dictate that the question be answered in the negative.

As this Court is aware, Florida applies the Restatement's "significant relationships" test in determining choice-of-law questions in tort cases, Bishop v. Florida Specialty Paint Co., 389 So. 2d 999 (Fla. 1980), and applies the doctrine of lex loci contractus in contract actions. Sturiano v. Brooks, 523 So. 2d

1126 (Fla. 1988). The Plaintiffs' claims in this action are tort claims for fraud in the inducement,[3] but contract law is also implicated because the precise question is whether the choice-of-law provision in a release will be given effect when the release was procured through fraud. Ultimately, however, whether a tort issue or a contract issue is involved, we submit that Florida choice-of-law principles would disallow enforcement of the choice-of-law provision in this release on public policy grounds.

Under Florida's choice-of-law rules, foreign law will not be applied in Florida to work a result that contravenes the public policy of this state. See, e.g., Gillen v. United Services Automobile Ass'n, 300 So.2d 3 (Fla. 1974); Cerniglia v. C. & D. Farms, Inc., 203 So. 2d 1 (Fla. 1967); Lloyd v. Cooper Corporation, 134 So. 562 (Fla. 1931); Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc., 377 So. 2d 825 (Fla. 1st DCA 1979). And it is well established that Florida public policy does not allow parties to contract against liability for their own fraud or other intentional torts. See, e.g., Oceanic Villas, Inc. v. Godson, 4 So. 2d 689 (Fla. 1941); Kellums v. Freight Sales Centers, Inc., 467

---

[3]See, e.g., Location 100, Inc. v. Gould S.E.L. Computer Systems, Inc., 517 So. 2d 700, 706 (Fla. 4th DCA 1987) ("an action to recover for fraud in the inducement is based not on the contract, but on the tort").

So. 2d 816 (Fla. 5th DCA 1985); Mankap Enterprises, Inc. v. Wells Fargo Alarm Services, 427 So. 2d 332 (Fla. 3d DCA 1983); Goyings v. The Jack and Ruth Eckerd Foundation, 403 So. 2d 1144 (Fla. 2d DCA 1981); Zuckerman v. Vernon Corporation v. Rosen, 361 So. 2d 804 (Fla. 4th DCA 1978).

> The law is settled that a party cannot contract against liability for his own fraud in order to exempt him from liability for an intentional tort, and any such exculpatory clauses are void as against public policy.

Mankap, 427 So. 2d at 334.

The only purpose behind DuPont's urging throughout this case that the Delaware choice-of-law provision in the release should be enforced was so that DuPont could make an argument that under Delaware law the release bars the Plaintiffs' claims notwithstanding the fact that the release was procured through fraud. Plaintiffs do not agree that Delaware law would have that effect, and, in fact, the main case on which DuPont has been placing its reliance — Matsuura v. E.I. DuPont de Nemours & Co., Civil No. CV-96-01180 DAE Order Granting Judgment on the Pleading (D. Ha. June 12, 1997) — was quite recently reversed by the United States Ninth Circuit Court of Appeals, after the Eleventh Circuit had certified the questions in these cases to this Court. Matsuura v. E.I. DuPont de Nemours & Co., ___ F.3d ___, 1999 WL 42166 (9th

Cir. 1999)[4] (applying Delaware law). In any event, insofar as DuPont's purpose in obtaining, and attempting to enforce, its choice-of-law provision was to use Delaware law to avoid liability for its own intentional fraud, we submit that the cited cases should disallow enforcement of the provision.

Insofar as this Court needs to expand on prior Florida law on this point to meet the exact circumstances presented here, we urge the Court to continue to include in Florida's choice-of-law rules the principle that foreign law will not be applied in Florida to work a result that contravenes Florida public policy.

We further submit that the question posed by the Eleventh Circuit is not truly presented on the facts of these cases. The Eleventh Circuit's question is: "Does a choice-of-law provision in a settlement agreement control the disposition of a claim that the agreement was fraudulently procured, <u>even if there is no allegation that the choice-of-law provision itself was fraudulently procured?</u>" Here, however, while it is true that the Plaintiffs' complaints did not go through the releases clause by clause, and sentence by sentence, alleging that <u>each</u> one was procured by fraud, Plaintiffs

---

[4]It is thus not known whether DuPont will continue to urge that Delaware law should apply since the Ninth Circuit in <u>Matsuura</u> held, applying Delaware law, that a DuPont release identical to those involved here does <u>not</u> bar similarly situated plaintiff plant nurseries in Hawaii from suing DuPont for fraud in the inducement.

allegations are that the entire settlement was procured through fraud so that none of its provisions should be enforced against the Plaintiffs.

Moreover, as just indicated, DuPont has made it clear that its reason for including the choice-of-law provision was a belief that Delaware law would protect it from the consequences of its own fraud should Plaintiffs ever discover that fraud. That being the case, it cannot fairly be said that the choice-of-law provision was not also procured through fraud.

For this reason, the principles of the Restatement of the Law Second, Conflict of Laws §201, even if adopted by this Court, would dictate no different result here because the choice-of-law provision itself was procured by fraud.[5]

Thus, we respectfully submit that the Eleventh Circuit's first certified question is not presented in this case because the Plaintiffs are claiming that all of the provisions of the settlement were procured by fraud, and because DuPont's intent in

---

[5]Section 201 of the Restatement provides: "the effect of misrepresentation, undue influence and mistake upon a contract is determined by the law selected by the application of the rules of §§187-188." The Comment to §188 states: "a choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation[.]"

procuring Plaintiffs' acquiescence in the choice-of-law provision was to protect itself from the consequences of its own fraud, which was then known to DuPont but not to Plaintiffs.

If the question is to be answered, we respectfully submit that Florida has no reason to interpret its choice-of-law rules, or create new ones, for the purpose of helping a Delaware corporation to escape liability for perpetrating frauds on Florida citizens. The answer to the first question posed by the Eleventh Circuit should thus be that if enforcement of such a choice-of-law provision to apply foreign law will work a result that contravenes Florida public policy, it will not control disposition of a fraud in the inducement claim.

CERTIFIED QUESTION II

IF FLORIDA LAW APPLIES, DOES THE RELEASE IN THESE SETTLEMENT AGREEMENTS BAR PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIMS?

Although the Plaintiff nurseries agree with the Eleventh Circuit Court of Appeals that there is no case in Florida which is precisely on all fours in every particular with the instant cases, it is nonetheless clear under existing Florida law that this question must be answered in the negative.

DuPont's position throughout these proceedings has been that the courts and the law should help DuPont get away with perpetrating fraud on Florida citizens by ruling that the DuPont-drafted settlement documents are an ironclad defense to any attempts to ask DuPont to answer for its intentional wrongdoing. But fraud is abhorrent to Florida law, and as a matter of public policy Florida will not enforce parties' contractual attempts to exempt themselves from liability for their own fraud. See Oceanic Villas, supra; Kellums, supra; Mankap, supra; Goyings, supra; Zuckerman, supra.

This Court's decision in HTP, Ltd. v. Lineas Aereas Costarricenses, 685 So. 2d 1238 (Fla. 1996), illustrates the Florida courts' aversion to fraud. In HTP, this Court determined that a cause of action for fraud in the inducement of a settlement agreement is a tort independent of the contract, not barred by any of the economic loss rule concerns that arise in purely contractual litigation. In so holding, this Court quoted with approval the portion of Judge Altenbernd's dissent in Woodson v. Martin, 663 So. 2d 1327 (Fla. 2d DCA 1995), which recognized that claims for fraud serve an important societal interest:

> ***[T]he interest protected by fraud is society's need for true factual statements in important human relationships, primarily commercial or business relationships. More specifically,***

> ***the interest protected by fraud is a plaintiff's right to justifiably rely on the truth of a defendant's factual representation in a situation where an intentional lie would result in loss to the plaintiff.***

HTP, 685 So. 2d at 1240 (quoting Woodson, 663 So. 2d at 1330 Altenbernd, J., dissenting).

In keeping with its history of refusing to countenance fraud, Florida law has long provided Florida litigants access to the courts to have their fraud claims determined by a trier of fact — including in those cases where a release is alleged to bar those claims. See, e.g., Florida East Coast Railway Co. v. Thompson, 111 So. 525 (Fla. 1927); Winter Park Telephone Co. v. Strong, 179 So. 289 (Fla. 1938); Defigueiredo v. Publix Super Markets, Inc., 648 So. 2d 1256 (Fla. 4th DCA 1995); Estate of Gimbert, et al. v. Lamb, 601 So. 2d 230 (Fla. 2d DCA 1992); Buchanan v. Clinton, 293 So. 2d 120 (Fla. 1st DCA 1974).

In Florida East Coast Railway, this Court set forth the legal principle which governs the effect of releases allegedly obtained by fraud:

> ***A contract procured through fraud is never binding upon an innocent party thereto. As to him, such contract is voidable; as to the wrongdoer, it is void.*** If a party to a written release of liability for personal injuries was induced to sign it by false and fraudulent representations, either as to the nature or extent of his injuries or as to the

> contents, import, or legal effect of the release, and he himself innocently and justifiably relied upon such representations to his detriment and was guilty of no negligence in failing to ascertain the true facts, he is not bound by such release.

Florida East Coast Railway, 111 So. at 527.[6] Since a party will not be bound by a fraudulently obtained release, it necessarily follows that the trier of fact must determine whether there was fraud in procuring the release before giving effect to the release terms. If the release was procured by fraud, then the release terms do not bar the plaintiff's damages claims. See, e.g., Winter Park Telephone, supra (affirming jury's determination that release was procured by fraud and award of damages).[7]

---

[6] See also, e.g., Jacksonville Terminal Co. v. Misak, 102 So. 2d 295 (Fla. 1958) (binding effect of a release is brought into question by allegations that release was obtained by fraud); Florida Power & Light Co. v. Horn, 131 So. 219 (Fla. 1930) (where there is evidence of fraud, the binding effect of a release is a question for the jury); Braemer Isle Condominium Assoc., Inc. v. Boca Hi, Inc., 632 So. 2d 707 (Fla. 4th DCA 1994) (release enforced as written in absence of allegations of fraud, coercion, or undue influence); Pan-American Life Insurance Co. v. Fuentes, 258 So. 2d 8 (Fla. 4th DCA 1971) (where there is no allegation of fraud, an unambiguous release will be upheld); Biscoe v. Evans, 181 So. 2d 564 (Fla. 1st DCA 1966) (in order to avoid terms of release, plaintiff had to allege release was obtained through fraud).

[7] See also, e.g., Defigueiredo and Buchanan, supra, reversing summary judgments in favor of defendants since plaintiffs had come forward with facts sufficient to create questions of fact for the jury on whether the releases had been obtained through fraud. If the evidence does not establish fraud, on the other hand, then the release will be given effect. Florida East Coast Railway, supra (reversing the jury's determination that release was procured by

This same principle of Florida law — i.e., that a plaintiff who is defrauded into signing a release of claims is not bound and thereby barred by the release — applies in the instant cases as well. The Plaintiffs' complaints alleged all of the facts necessary to state causes of action for fraud in the inducement under Florida law[8] and, at the motion to dismiss stage, it is axiomatic that those allegations are taken as true. Thus, at the motion to dismiss stage, the allegations of fraud are taken as true, the fraudulently obtained release is temporarily deemed void as to the defendant/wrongdoer, and the plaintiff is allowed to proceed to the next stage of the litigation.

In short, Florida law in no way supports DuPont's position that a fraudulently procured release should itself shut the courthouse doors to any redress for the fraud. In fact, Florida law is replete with cases affording a variety of remedies notwithstanding previous — fraudulently procured — releases. First, parties defrauded into settling and providing releases are

---

fraud based on insufficiency of the evidence).

[8]See, e.g., Mettler, Inc. v. Ellen Tracy, Inc., 648 So. 2d 253, 255 (Fla. 2d DCA 1994) (elements of fraud in the inducement are (1) a misrepresentation of a material fact, (2) knowledge by the person making the representation that it is false, (3) intent by that person to induce the recipient to rely on and act upon the representation, (4) action by the plaintiff/recipient in reasonable reliance on the misrepresentation, and (5) injury to the plaintiff as a result).

permitted to rescind the settlement altogether, leaving them free to sue on their original claims. See, e.g., T.D. McCurley v. Auto-Owners Insurance Co., 356 So. 2d 68 (Fla. 1st DCA 1978); Greene v. Kolpac Builders, Inc., 549 So. 2d 1150 (Fla. 3d DCA 1989). Parties may also simply sue directly on their original claims and avoid the defense of release on grounds of fraud. See, e.g., McGill v. Henderson, 98 So. 2d 791 (Fla. 1957); Winter Park Telephone, supra; Florida East Coast Railway, supra; Levine v. Levine, 648 So. 2d 1228 (Fla. 4th DCA 1995); Defiqueiredo, supra; Ford v. Coleman, 462 So. 2d 834 (Fla. 5th DCA 1984), rev. denied, 475 So. 2d 694 (Fla. 1985); Buchanan, supra. And, in specific answer to the Eleventh Circuit's question and DuPont's argument to the contrary, parties may sue for damages caused by fraud in the inducement of a release without, of course, being barred by the release. See, e.g., HTP, supra[9]; Estate of Gimbert, et al. v. Lamb, 601 So. 2d 230 (Fla. 2d DCA 1992); Iowa National Mutual Insurance Co. v. Worthy, 447 So. 2d 998 (Fla. 5th DCA 1984).[10]

---

[9]The Florida Third District's decision in HTP, found at 661 So. 2d 1221 (Fla. 3d DCA 1995), shows that damages were being sought for the fraud. This Court's decision approved the Third District's decision in full.

[10]As this Court's decision in HTP and other of the cases cited above make clear, defrauded releasors may sue for the damages caused by fraud in the inducement of a settlement without seeking rescission. Although they are not Florida cases, the decisions in Slotkin v. Citizens Casualty Co. of New York, 614 F.2d 301 (2d Cir.

In sum, the answer to the second question certified by the Eleventh Circuit is that no, the release in these settlement agreements does not bar Plaintiffs' fraudulent inducement claims.

CONCLUSION

Based on the foregoing facts and authorities, Plaintiffs/Appellants Mazzoni Farms, Inc. and Jack Martin Greenhouses, Inc. hereby respectfully submit that the first question certified to this Court by the United States Eleventh Circuit Court of Appeals, if answered at all, should be answered in the negative, and that the second question should be answered in the negative.

Respectfully submitted,

FERRARO & ASSOCIATES, P.A.
Suite 3800
200 South Biscayne Boulevard
Miami, Florida 33131
-and-
RUSSO, WELLS & ASSOCIATES, P.A.
Appellate Law Center
6101 Southwest 76th Street
Miami, Florida 33143
Telephone (305) 666-4660

Attorneys for Appellants

1979), cert. denied, 449 U.S. 981 (1980), DiSabatino v. United States Fidelity & Guaranty Co., 635 F. Supp. 350 (D.Del. 1986) and Bilotti v. Accurate Forming Corp., 118 A.2d 24 (N.J. 1963) are helpful in explaining why the law does not require the defrauded parties in these types of cases to seek rescission and why it would be unjust to do so.

By: ____________________________

ELIZABETH K. RUSSO
Florida Bar No. 260657

By: ____________________________

KIMBERLY L. BOLDT
Florida Bar No. 957399

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the Initial Brief of Appellants was mailed this 23rd day of March, 1999 to: Paul L. Nettleton, Esquire, Attorneys for Appellees, Carlton, Fields, et. al, 4000 NationsBank Tower, 100 Southeast Second Street, Miami, Florida 33131; and James F. Bogan, III, Esquire, A. Stephens Clay, Esquire, and William Boice, Esquire, Attorneys for Appellees, Kilpatrick Stockton LLP, 1100 Peachtree Street, Suite 2800, Atlanta, Georgia, 30309.

____

Appendix

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
02/04/99
THOMAS K. KAHN
CLERK

No. 97-5931

D. C. Docket No. 97-62-CV-JAL

MAZZONI FARMS, INC., a Florida corporation,

Plaintiff-Appellant.

versus

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware corporation, d.b.a. Dupont,
CRAWFORD & COMPANY, a Georgia Corporation,

Defendants-Appellees.

A 1

No. 97-5932

D.C. Docket No. 97-63-CIV-LENARD

JACK MARTIN GREENHOUSES, INC.,
f.k.a. M & M ORNAMENTALS, INC.,
and JACK MARTIN,

Plaintiffs-Appellants,

versus

E.I. DUPONT DE NEMOURS AND COMPANY,
d.b.a. Dupont,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(February 4, 1999)

Before ANDERSON and DUBINA, Circuit Judges, and FAY, Senior Circuit Judge.

DUBINA, Circuit Judge:

These consolidated cases present the question whether a release in a settlement agreement bars a claim that defendant fraudulently induced plaintiffs to settle. Initially, however, we must decide whether a choice-of-law provision in the same agreement applies to the fraudulent inducement claim. Because we find no definitive Florida precedent for the choice-of-law issue, we certify that question to the Supreme Court of Florida and postpone disposition of these cases until we receive an answer from that court. In the event the Supreme Court of Florida decides Florida law applies, we also certify the merits question.

I. BACKGROUND

Plaintiffs Mazzoni Farms and Jack Martin are commercial nurseries whose plants were allegedly damaged by a Dupont product called Benlate. In the early 1990's, plaintiffs sued Dupont and a local distributor of Dupont products for property damage and fraudulent concealment of Benlate's alleged defects. The parties subsequently settled those suits, and the settlement agreements contained this release:

> In consideration of Defendant's payment of the amount set forth in the authorization previously signed by Plaintiff, Plaintiff hereby releases Defendant from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Plaintiff ever had, now has, or may hereafter have against Defendant, by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed (including, but not limited to, the claims

asserted and sought to be asserted in the Action).

(Mazzoni R1-8, Ex. A ¶ 1; Jack Martin R2-33, Ex. A ¶ 1.) The settlement agreements also contained a choice-of-law provision:

> This Release shall be governed and construed in accordance with the laws of the State of Delaware without giving effect to the conflict of laws or choice of law provisions thereof.

(Mazzoni R1-8, Ex. A ¶ 15; Jack Martin R2-33, Ex. A ¶ 1.)

After settling with Dupont, plaintiffs discovered information that led them to believe that Dupont had destroyed evidence and presented perjured testimony in the original litigation. They filed these suits in Florida state court, alleging that Dupont fraudulently induced them to settle. Dupont removed these cases to the district court on the basis of diversity of citizenship and then moved for dismissal. Once in federal court, plaintiff Mazzoni Farms amended its complaint and added Crawford & Company, a Dupont agent, as a co-defendant.

The district court, relying on Florida law, dismissed plaintiffs' claims under Fed.R.Civ.P. 12(b)(6), stating that the releases barred plaintiffs' claims. The court found that Florida law requires a party bringing a fraudulent inducement claim to choose between equitable and legal remedies. It found further that by asking for damages instead of recission, which might have required them to tender back the

A.4

settlement proceeds, plaintiffs elected to pursue a legal remedy. As a consequence, the court determined that they ratified the settlement agreements which released Dupont from "all . . . claims, . . . whether known or unknown . . . ." (Mazzoni R1-8, Ex. A ¶ 1; Jack Martin R2-33, Ex. A ¶ 1.)

II. DISCUSSION

We review de novo the district court's decision to apply Florida law to plaintiffs' claims. See Strochak v. Fed. Ins. Co., 109 F.3d 717, 719 (11th Cir. 1997). Since the district court sits in Florida, Florida's choice-of-law rules apply. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

Dupont argues that Delaware law controls because plaintiffs have not specifically alleged that Dupont fraudulently procured the choice-of-law provisions themselves. Plaintiffs' response is that their general allegation of fraudulent inducement renders void the choice-of-law provisions. To support the proposition that a choice-of-law provision controls in a fraudulent inducement case, in the absence of a specific allegation that the defendant fraudulently procured the choice-of-law provision itself, Dupont points us to two authorities: (1) Section 201 of the Restatement (Second) of Conflict of Laws, and (2) a line of Florida cases that applies a similar rule to arbitration clauses.

Section 201 provides that "[t]he effect of misrepresentation, duress, undue

influence and mistake upon a contract is determined by the law selected by application of the rules of §§ 187-188." Restatement (Second) of Conflict of Laws § 201 (1971). Section 187, in turn (with two exceptions not applicable here), permits parties to choose the law that will govern their contractual rights and duties. See id. § 187. So, if Florida were to follow the Restatement, Delaware law would apply to these fraudulent inducement suits, even if plaintiffs specifically challenged the choice-of-law provision, since Section 201 is unqualified.

But no Florida court has yet followed Section 201. The line of cases to which Dupont points by way of a "cf." signal stands for the proposition that an arbitration clause in a contract will compel arbitration of even a fraudulent inducement claim, unless the fraudulent inducement claim is directed at the arbitration provision itself. See, e.g., Medident Constr., Inc. v. Chappell, 632 So.2d 194, 195 (Fla. 3d Dist. Ct. App. 1994); Manning v. Interfuture Trading, Inc., 578 So.2d 842, 843 (Fla. 4th Dist. Ct. App. 1991); Physicians Weight Loss Centers of America, Inc. v. Payne, 461 So.2d 977, 978 (Fla. 1st Dist. Ct. App. 1984).

We find these cases unpersuasive because they do not present cleanly a question of state law. Rather, they rely on the federal policy favoring liberal interpretation of agreements to arbitrate and specifically on the United States Supreme Court's interpretation of Section 3 of the Federal Arbitration Act (F.A.A.),

9 U.S.C. § 3, in Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 404 (1967). Prima Paint involved an application for a stay pending arbitration made to a federal court, but the Supreme Court has since stated (in dicta) that Section 3 also applies to state courts. See Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp., 460 U.S. 1, 26 & n.34 (1983). In addition, the Florida cases themselves repeatedly cite Prima Paint. See, e.g., Manning, 578 So.2d at 843; cf. Trojan Horse, Inc. v. Lakeside Games, 526 So.2d 194, 195-96 (Fla. 3d Dist. Ct. App. 1988) (F.A.A. § 2 applies in Florida courts); Old Dominion Ins. Co. v. Dependable Reinsurance Co., 472 So.2d 1365, 1367 (Fla. 1st Dist. Ct. App. 1985) (F.A.A. applies in Florida courts).

Plaintiffs' argument on the choice-of-law question is the same as its argument on the merits: first, that since the district court dismissed these cases under Rule 12(b)(6) for failure to state a claim, we must assume that all their factual allegations are true, including the fraud; and second, that if Dupont fraudulently induced plaintiffs to settle, then the settlement agreements, which include the choice-of-law provision (and the release), are voidable at plaintiffs' option. The first proposition is true enough, but we question whether the authority on which plaintiffs rely for the second proposition speaks to this issue. They cite Florida East Coast Railway Co. v. Thompson, 111 So. 525, 528 (Fla. 1927), which says that "[a] contract procured

A-7

through fraud . . . is voidable [at the option of the innocent party]." This statement is uncontroversial enough in general terms, but we are not persuaded that it means we cannot enforce the choice-of-law provision because plaintiffs have not specifically alleged that Dupont fraudulently procured the choice-of-law provision itself, and the Restatement rule would give effect to the choice-of-law provision.

In the absence of controlling authority, we certify this question to the Supreme Court of Florida. Also, because the plaintiffs' argument on the choice-of-law question is the same as its argument on the merits, a decision in favor of plaintiffs on the choice-of-law question might affect the merits question. For that reason, in the event the Supreme Court of Florida decides that Florida law applies, we also certify the merits question to that court. We note further that no Delaware case precisely addresses the question whether the release bars plaintiffs' fraudulent inducement claims, so if the Supreme Court of Florida directs us to apply Delaware law, we may need to certify that question to the Supreme Court of Delaware.

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA, PURSUANT TO SECTION 25.031, FLORIDA STATUTES, AND RULE 9.150, FLORIDA RULES OF APPELLATE PROCEDURE.

TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES THEREOF:

The United States Court of Appeals for the Eleventh Circuit concludes that

these cases involve determinative questions of state law for which there appear to be no clear, controlling precedents in the decisions of the Supreme Court of Florida. This court therefore certifies these questions to the Supreme Court of Florida for instructions based on the facts of these cases.

Styles of the cases: (1) Mazzoni Farms, Inc., a Florida corporation, Plaintiff-Appellant, v. E.I. Dupont Nemours & Co., a Delaware corporation, d.b.a. Dupont Crawford & Co., a Georgia corporation, Defendants-Appellees, Case No. 97-5931; and (2) Jack Martin Greenhouses, Inc., f.k.a. M & M Ornamentals, Inc., and Jack Martin, Plaintiffs-Appellants, v. E.I. Dupont Nemours and Co., d.b.a. Dupont, Defendant-Appellee, Case No. 97-5932.

Movant: Dupont is the movant for purposes of the choice-of-law question; plaintiffs are the movants for purposes of the substantive question. See Fla. R. App P. 9.150(d).

Statement of Facts: We incorporate our statement of facts from above.

Questions to be Certified to the Supreme Court of Florida:

(1) DOES A CHOICE-OF-LAW PROVISION IN A SETTLEMENT AGREEMENT CONTROL THE DISPOSITION OF A CLAIM THAT THE AGREEMENT WAS FRAUDULENTLY PROCURED, EVEN IF THERE IS NO ALLEGATION THAT THE CHOICE-OF-LAW PROVISION ITSELF WAS FRAUDULENTLY PROCURED?

(2) IF FLORIDA LAW APPLIES, DOES THE RELEASE IN THESE SETTLEMENT AGREEMENTS BAR PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIMS?

As usual, our sterile phrasing of the issues need not preclude the Florida Supreme Court from inquiring into the specifics of these cases. See Dorse v. Armstrong World Ind., Inc., 798 F.2d 1372, 1377-78 (11th Cir. 1986).

The clerk is directed to send the entire records of these cases with this certificate.

QUESTIONS CERTIFIED.